

Your Right to Private Property

How Property Rights are Protected by the Constitutions of the United States and the State of Utah

State of Utah - Department of Commerce

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DISCLAIMER

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These guidelines are provided by the Office of the Property Rights Ombudsman in an effort to provide better understanding of constitutional private property protections and the land use regulation process. These guidelines are NOT meant to constitute legal advice. They simplify and broadly generalize complex issues of law. Questions should always be directed to your attorney for specific advice. Suggestions and comments are always welcome.

We appreciate the assistance of Craig Call, the former Lead Attorney for the Office of the Property Rights Ombudsman, who prepared the initial drafts of the materials in this booklet.

YOUR RIGHT TO PRIVATE PROPERTY

Note: This is a gross oversimplification of a complex subject, provided as a checklist and not as an exhaustive statement of all aspects of property rights. It is meant as an overview and starting point for a discussion of various aspects of property rights in Utah, and not a comprehensive list of all issues involved.

Rights vs. Interests or Preferences

Rights – Specific aspects of property ownership that the courts or the legislature has said are “protected property interests.” Although subject to certain regulation and restriction, property “rights” are legally protected by ordinance, statute, or constitution. You can legally enforce these “rights”.¹

Interests/Preferences/Expectations – Other aspects of property ownership that the courts have said are subject to greater regulation and restriction than “rights,” perhaps even extinguishment, by government entities. These aspects are subject to change when legislative policies change. Not really property “rights”, as we are using the term here, but often called property rights. Such expectations come from a sense of what is fair and expected, and not from the courts or the legislature. If you cannot legally enforce these interests, preferences, and expectations they are really not “rights” under the law, though they may be argued to be moral or ethical rights. For purposes of our discussion, we will only discuss legally protected aspects of property ownership as “rights”.

Examples of Rights:

Just Compensation:

You have the right to **just compensation** if title to or use of your property is needed for a public project or if a permanent interest in property, such as a utility easement, is needed. Usually this involves government occupancy of the property.²

You have the right to negotiate with the agency or utility prior to condemnation and the right to due process in the **valuation** of the property to be acquired and the amount of just compensation to be paid.³

You have the right to consult with the property rights ombudsman and request **mediation and/or arbitration** to determine the compensation to be paid. The goal of the ombudsman is to help you resolve disputes over just compensation and other property rights issues without having to participate in a lawsuit.⁴

You have no right to **stop the condemnation** process if it is found to be for a public purpose. Courts usually give deference to the decision to take your property. If the local legislative body votes to condemn your property for one of the purposes listed in state statute, it is an uphill battle to resist that decision.⁵

On the other hand, you still have the right to challenge the acquisition of property for **public use**, even if just compensation is paid, until it is shown that the proposed use is indeed for a public purpose. The project must be designed to do “the greatest public good with the least private injury.”⁶

You have the right to expect that the agency or utility will follow the required procedures when your property is condemned. If the entity acquiring the property does not have the authority to condemn for the proposed use or has not followed the mandated process, the condemnation will be dismissed.⁷

You have no right to be **notified** that a government entity is considering using eminent domain to acquire your land or when it is considering the adoption of a resolution and preparing to proceed to file a legal action against you. Usually the final decision is made in a public meeting where an agenda is posted 24 hours in advance, but there is no duty to notify you personally that the matter will be considered.⁸

Traditional Common Law Rights:

You have the right of **alienation** - to sell your property or rent it to someone else.⁹

You have the right to **quiet enjoyment**. To be free from unreasonable and ongoing nuisances, such as odors, noise, dust, vibrations, pollution, trash and debris, whether the source of the nuisance is a neighbor or a governmental activity.¹⁰

You have no right to create a **nuisance** yourself as the term "nuisance" is defined by statute and historical property law. Just as you can take action against the government if it imposes a nuisance on you, if you create a nuisance for others, your neighbors or the government on behalf of your neighbors, can take action against you to stop the nuisance and recover damages from you.¹¹

You have no right to create or continue a use where there is substantial evidence that the use will significantly **endanger the health and safety** of the community.¹²

Right to Exclude Others:

You have the right to **exclude others**, either temporarily or permanently. You are entitled to legal protections against even short-term government actions involving invasion of your privacy and/or unreasonable searches and seizures. You are also entitled to refuse permanent use or occupancy of your property. You may refuse to allow trails, access or occupancy easements to be imposed upon you without your permission.¹³

You have no right to prohibit public use of a trail or road across your private property as a thoroughfare if the public has created the thoroughfare without permission and without interruption for a period of ten years as a **prescriptive easement**.¹⁴

You have no right to remove a permanent utility, fence line, or other occupancy of your private property after it has been in place for twenty years without permission and thus has created an **easement by use** or a **boundary by acquiescence**.¹⁵

You have no right to refuse to allow access to your property by the **easement holders** when an easement has been created, either by use or by a written easement. This is so even if the easement was created by actions of previous owners who allowed an easement by use to be created or who conveyed easements to public agencies or utilities. Once the easement is in place, the easement holder has the right to enter upon your property and make reasonable use of the easement and maintain it so as to continue the use protected by the easement.¹⁶

You have no right to refuse access to those **surveying for public projects** if they provide reasonable notice of the need to come onto your property and do so at reasonable times.¹⁷

Due Process of Law:

You have the right to **due process** – the right to only be regulated according to ordinances and standards adopted through the mandated processes, with the mandatory safeguards related to notice and minimum public involvement. This includes procedural due process, including the right to adequate notice and a fair hearing when your protected property rights are to be affected by public actions. It also includes substantive due process, which is the right to be free from regulations that clearly do not advance the general welfare and are arbitrary, capricious and unreasonable.¹⁸

You have the right to expect that regulations will be interpreted, where ambiguous, **in favor of the use of property**.¹⁹

You have the right to be free from regulations that are so **vague** as to be void.²⁰

You have the right to expect that regulations will not be **arbitrarily applied** and enforced. You have the right to be free from administrative decisions in the regulation of property that are not supported by substantial evidence in the record.²¹

You have the right to **approval of a land use permit** or application when your proposal meets the terms of the regulations that are in place when the application is submitted in complete form, unless a compelling, countervailing public interest exists or there is a new regulation pending at the time the application is filed that would prohibit the proposed permit or application.²²

You have no right to specific notice when your property is to be **rezoned**. You are only entitled to be notified if notice is not published in a newspaper. If there is no such publication, then you are entitled to notice by mail sent three days or more before the first hearing.²³ Some local ordinances provide more notice requirements, particularly when only a few parcels of land are being rezoned. Check your local ordinances.

Absent a provision in a local ordinance to the contrary, you have no right to a **quick review** of your land use requests. There are virtually no effective sanctions or remedies in place that can be

used to legally force a local government to consider land use applications and requests in a timely manner. Delays in the process of approval must be extraordinarily egregious before they violate due process and interfere with property rights.²⁴

Streets and Access:

You have the right to **air, light and view** to your property across a street that your property abuts. A government entity may not put an overpass, a soundwall, a bridge or other obstruction in a street that you abut and have access to without paying compensation to you for the impact on your property value. Building a freeway or traffic structure would not result in compensation to you if it is not within a street you have access to.²⁵

You have the right to **reasonable access** to your property. This means that you must be able to have an access onto at least one street abutting your property unless your property was originally and intentionally land-locked in the first place. The location and type of access may, under certain conditions, be changed, so long as you continue to have reasonable access for the purposes that you have put your property to in the past or have a reasonable expectation to use your property for in the future.²⁶

You have no right to access your property in the **most direct route** over the system of streets. The configuration of streets and roads can be changed so that the path to your property is more circuitous without violating a property right, so long as the access is still reasonable.²⁷

You have no right to be free from **temporary interruptions** to access from construction, public activities, emergencies and other normal occurrences, so long as your access is not unreasonably and permanently interrupted without justification.²⁸

Vested Rights:

You have a vested right to “**grandfathered**” uses. Such a “nonconforming” use is one that was once legally permitted but now, under existing law, would be prohibited. You may continue a nonconforming use so long as the use is continuous and never abandoned. You usually bear the burden to establish the use was legal and has not been abandoned.²⁹

You have the right to proceed with approved land use permits and approvals under the doctrine of **zoning estoppel**, even if the permit or approval was granted in error, so long as the mistake was innocent and you were unaware of the error at the time the permit was approved, but only if you have significantly changed your financial situation in reliance on the permit or approval being valid.³⁰

You have the right to have an application reviewed under the **current law** that was in place when the application was submitted in complete form, unless it is shown that there is a compelling, countervailing public interest in changing the regulations that apply or unless there was a change in the law pending at the time of the application that would have required that your application be denied.³¹

You have no right to **continue a use** if that use was never legally established; that is, if it was prohibited by regulations in place at the time the use was commenced.³²

Development Approvals:

You have the right to balanced **exactions**, conditions, and fees as imposed in *administrative* development approvals. Those conditions placed on development in the process of approval of an administrative land use application such as for a subdivision approval, building permit, conditional use permit, variance, etc. must be provided for in an ordinance and not imposed ad hoc or arbitrarily. Conditions must be shown to advance a legitimate function of the entity imposing them, demonstrated to be roughly proportionate to burdens created by the proposed development, and imposed in a manner that is no more intrusive on protected property rights than is necessary to achieve the stated public purposes. The conditions imposed on *legislative* decisions like rezoning and annexation are sometimes not subject to these same limitations.³³

You have no right to intensify the use of your property, even in compliance with existing zoning, if you do not meet the terms of a local ordinance that requires **adequate public facilities** to accommodate your development. You can be denied the right to develop where adequate utilities, streets, etc. do not exist until you provide them or someone else does. These rules must be reasonable. Some local governments allow you to provide facilities that will serve more than your development and later recover some of your costs from subsequent development. Total denial of all use, however, must only be imposed in a situation where the health and safety issues are very significant.³⁴

Regulations on the Use of Property:

You have the right to be free from economically **onerous regulations** – which create extraordinary burdens on the use of property or which result in the loss of all economically viable use of property.³⁵ (Regulations are rarely found to be this onerous.)³⁶

You have no right to **use your land** for any use you wish, even if the use you wish is perfectly legal in another location where the land use laws are different and where such a use in another location is considered beneficial. Land use regulations, enacted as the result of political processes, are valid and do not usually raise property rights issues. Loss of value as a result of regulation does not mean a property right has been violated. Regulations, though perfectly valid, do often reduce or enhance property values without triggering a property rights issue.³⁷

You have no right to the **most profitable use**. As explained above, you are entitled to some viable use, but not the most profitable use.³⁸

You have no right to be **annexed** into a nearby city or town. It is a matter of local discretion. If you cannot use your property for any economically viable use, you may have a claim against the county involved, but you probably have no cause of action against a city or town that will not annex your property.³⁹

You have no vested right in the **existing zoning**, but only a vested right to continue an established use if that use was legal when established.⁴⁰

You have no right to be free from regulations related to **health and safety**, such as the fire code, the building code, parking regulations, nuisance ordinances, weed abatement, historic district regulations, open space restrictions, sensitive lands ordinances, etc. so long as those regulations allow some economically viable use.⁴¹

You have no right to use your property without paying legally enacted and enforced **fees and taxes**.⁴²

Remedies for Interference with Property Rights:

You have the right to file a **lawsuit** against those violating your property rights.⁴³

You have the right to contact the **property rights ombudsman**, who can initiate mediation or appealable arbitration to protect certain specific property rights. If the dispute involves a government entity, he can help to resolve disputes related to eminent domain, relocation assistance, and the taking of private property without the payment of just compensation. He does not get involved in disputes between two private property owners.⁴⁴

You have the right to file a lawsuit to **enforce the local land use ordinance** against the city, your neighbors, or any other landowner if the violation of the ordinance creates some prejudice to you.⁴⁵ The local government entity is required by law to follow the mandatory provisions of its own ordinances and is bound by the terms and standards of those ordinances.⁴⁶

You have no right to legally compel the city, town, or county to **enforce its ordinances** against your neighbors or other landowners. If the local government chooses not to enforce the ordinance, you cannot compel it to do so, but you can do it on its behalf through appropriate legal means. The difference here is subtle - you can require a city or county to follow its own mandatory ordinances itself, but you cannot require the local government entity to enforce its ordinances against others. You can enforce them yourself, however, if you choose to do so.⁴⁷

It is important to note, however, that the opportunity to bring legal actions and other appeals from local land use decisions are limited by strict time frames and deadlines. Be sure to check the local ordinances and relevant state statutes to ensure that your appeal is timely filed.⁴⁸

Note: This is a gross oversimplification of a complex subject, provided as a checklist and not as an exhaustive statement of all aspects of property rights. It is meant as an overview and starting point for a discussion of various aspects of property rights in Utah, and not a comprehensive list of all issues involved.

If you have specific comments, questions, or wish to discuss your specific property rights issues, please contact the Office of the Property Rights Ombudsman. There is no charge for the Office's assistance.

END NOTES:

¹. Black's Law Dictionary 1322 (7th ed. 1999). Definition of "right" as "3. A power, privilege or immunity secured to a person by law." For the purposes of this summary, the word "right" will refer to legal rights and not moral rights.

². See, generally, Utah Const. art. 1, § 22 (1895) and Utah Code Ann. § 78-34-1 et. seq.

³. Utah Code Ann. § 78-34-10 describes how just compensation is calculated. The legal proceedings to afford due process are also described in that chapter of the Utah Code.

⁴. Utah Code Ann. §§ 13-42-101 through 206 (property rights ombudsman), 78-34-4.5 (disclosures required before condemnation) and 78-34-21 (mediation and arbitration).

⁵. In *Cornish Town v. Koller*, 817 P.2d 705 (Utah 1991), it was held that the public purpose of a condemnation action is a matter for a judge, not a jury to decide. An example of judicial deference is found in *Bountiful v. Swift*, 535 P.2d 1236 (Utah 1975) and in *Kelo v. New London, CT* ____ U.S. ____ (2005).

⁶. Utah Code Ann. § 78-34-5(1).

⁷. *Town of Tremonton v. Johnson*, 164 P. 190 (Utah 1917), quoted in *Salt Lake Co. v. Murray City Redevelopment*, 598 P.2d 1339 (Utah 1979).

⁸. According to the accepted "bible" of eminent domain law, the rules for notice vary from state to state. See *Nichols on Eminent Domain*, § 7:2.05(3) (rev. 3rd ed. 2003). Utah has no such notice requirement other than the 24 hour notice required by the Open and Public Meetings Act found at Utah Code Ann. § 63-2-101.

⁹. *Andrus v. Allard*, 449 U.S. 51 (1979), and *Hodel v. Irving*, 481 U.S. 704 (1987).

¹⁰. *Katsos v. Salt Lake City*, 634 F. Supp. 100 (D. Utah 1986); *Board of Education of Logan City School District v. Croft*, 373 P.2d 697 (Utah 1962).

¹¹. Utah Code Ann. § 76-10-803.

¹². *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

¹³. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

¹⁴. Utah Code Ann. §72-5-104; *AWINC Corp. v. Simonsen*, 2005 UT App 168, __ P.3d __ (Utah App. 2005).

¹⁵. *Ault v. Holden*, 2002 UT 33, 44 P.3d 781 (Utah 2002).

¹⁶. *Nyman v. Anchor Dev., LLC*, 2003 UT 27, 73 P.3d 357 (Utah 2003).

¹⁷. Utah Code Ann. § 78-34-5(2).

¹⁸. *Smith Inv. Co. v. Sandy City*, 958 P.2d 245 (Utah App. 1998).

¹⁹. *Brown v. Sandy City Board of Adjustment*, 957 P.2d 207 (Utah App. 1998).

²⁰. *Jones v. Logan City*, 428 P.2d 160 (Utah 1967).

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- ²¹. Bradley v. Payson City Corp., 2003 UT 16, 70 P.3d 47 (Utah 2003); Utah Code Ann. §§ 10-9a-801(3)(b) and (c) (municipalities) and 17-27a-801(3)(b) and (c) (counties).
- ²². Utah Code Ann. §§ 10-9a-509 and 10-9a-603(2) (municipalities) and 17-27a-508 and 17-27a-603(2) (counties).
- ²³. Utah Code Ann. §§ 10-9a-503(3), 502(1)(a), and 205(2)(c)(ii)(A) (municipalities) and 17-27a-503(3), 502(1)(a), and 205(2)(c)(ii)(A) (counties).
- ²⁴. For an example of the requirements by the Courts that property owners respect the full process of local review and appeal, see Patterson v. American Fork City, 2004 UT 7, ¶16-21, 67 P.3d 466, 471-73 (Utah 2004). Only after extensive effort proves additional review futile can an applicant avoid additional local processes prior to filing a complaint in court or asking the property rights ombudsman to order arbitration of a takings claim. Such a situation of futility was, however, present in Diamond B-Y Ranches v. Tooele County, 2004 UT App 135, 91 P.3d 841 (Utah App. 2004).
- ²⁵. Utah State Road Commission v. Miya, 526 P.2d 926 (Utah 1974).
- ²⁶. Hampton v. State, 445 P.2d 708, 710-11 (Utah 1968).
- ²⁷. Id.
- ²⁸. Rocky Mountain Thrift Stores Inc. v. Salt Lake City Corp., 887 P.2d 848 (Utah 1994).
- ²⁹. Utah Code Ann. §§ 10-9a-511 (municipalities) and 17-27a-510 (counties).
- ³⁰. Xanthos v. Bd of Adjustment, 685 P.2d 1032 (Utah 1984).
- ³¹. Utah Code Ann. §§ 10-9a-509 (Municipalities) and 17-27a-508 (Counties). See also Western Land Equities, Inc. v. City of Logan, 617 P.2d 388 (Utah 1980).
- ³². Utah Code Ann. §§ 10-9a-103 (19) and (20) (municipalities) and 17-27a-103 (22) and (23) (counties) define noncomplying structures and nonconforming uses as those that were once legal. The statutory protections to continue existing uses and structures are inapplicable if the use or structure was not legal at the time it was made or constructed.
- ³³. Utah Code Ann. §§ 10-9a-508 (municipalities) and 17-27a-507 (counties). See also BAM Development v. Salt Lake County, 2004 UT App 34, 87 P.3d 710 (Utah App. 2004), cert. granted, 98 P.3d 1177 (Utah 2004). This case is on appeal to the Supreme Court as of the date of this writing (June 2005) so check the Supreme Court Opinions for further precedent.
- ³⁴. Lucas, 505 U.S. at 1025 n.12. Health, safety, fire and other codes are legal and enforceable to prevent development that creates unreasonable hazards to the public or occupants of property. Typical legal and enforceable requirements include minimum width of access for emergency vehicles, minimum lot size needed for proper functioning of a septic tank and well separations, ability to pass a percolation test for septic tanks, etc., even if they deny all economically viable use, so long as the dangers to health and safety justify such a harsh burden on property owners and are proven by substantial evidence.
- ³⁵. Id. See also Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).
- ³⁶. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Authority, 535 U.S. 302 (2002).
- ³⁷. Smith Inv. Co. v. Sandy City, 958 P.2d 245, 258 n.18 (Utah App. 1998).
- ³⁸. Id.

³⁹. Child v. City of Spanish Fork, 538 P.2d 184 (Utah 1975).

⁴⁰. Smith, 958 P.2d 245 at n.18.

⁴¹. Harmon City v. Draper, 2000 UT App 31, 997 P.2d 321 (Utah App. 2000). So long as it is "reasonably debatable" that a regulation advances the general welfare, it will be upheld.

⁴². Const. of Utah, art. XIII, § 2.

⁴³. Const. of Utah, art. I, § 11.

⁴⁴. Utah Code Ann. § 63-34-13.

⁴⁵. Utah Code Ann. §§ 10-9a-802 (municipalities) and 17-27a-802 (counties).

⁴⁶. Utah Code Ann. §§ 10-9a-509(2) (municipalities) and 17-27a-508(2) (counties).

⁴⁷. Utah Code Ann. §§ 10-9a-802 (municipalities) and 17-27a-802 (counties).

⁴⁸. A mandatory local appeals process is required by Utah Code Ann. §§ 10-9a-701 through 708 (municipalities) and 17-27a-701 through 708 (counties). Be sure to review these sections as well as the provisions about district court review and arbitration found at §§ 10-9a-801 through 803 (municipalities) and 17-27a-801 through 803 (counties).